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CHARLES ELMORE

IN THE

Supreme Court of The United States

February Term, 1929.

No. [redacted] 44

DISTRICT OF COLUMBIA, A MUNICIPAL CORPORATION,
Petitioner,

vs.

GEORGIANA THOMPSON,
Defendant.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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HAYWORTH PRINTING COMPANY - WASHINGTON D C

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TO THE HONORABLE, *the Chief Justice and Associate Justices of the Supreme Court of the United States:*

Comes now the District of Columbia, a municipal corporation, by its Commissioners, Proctor L. Dougherty, Sidney F. Taliaferro and William B. Ladue, and shows to the Court as follows: On March 1, 1912, there was approved an Act of Congress entitled "An Act to authorize the extension of Lamont Street, Northwest, in the District of Columbia." In pursuance of the authority of said statute, the Commissioners of the District of Columbia instituted con-

demnation proceedings in the Supreme Court of the District of Columbia, such proceedings being known as District Court Cause No. 1040, "In re: The extension of Lamont Street, Northwest." In said condemnation proceedings the jury allowed as the value of the land condemned, known as a portion of square 2605 and square 2604, the sum of $13,737.48; assessed the costs of said proceedings at $463.78, making a total of damages and costs $14,201.26, and, under the provisions of said Act, assessed said last mentioned sum as benefits against the adjacent property in the abutting squares 2602, 2603, 2604, 2605, 2606 and 2607.

The defendant named above, Georgiana Thompson, was the owner of lot 101, square 2603, and her property was assessed $200.00 as the amount of its proportionate part of said benefits. The verdict of the condemnation jury was ratified and confirmed, by the Court, on February 3, 1913. Subsequent thereto, on March 17, 1921, defendant Thompson paid said assessment to the Collector of Taxes of the District of Columbia.

On June 22, 1927, in the Municipal Court of the District of Columbia, said defendant filed a declaration in assumpsit, alleging, in substance, that notwithstanding the authorization of the above mentioned statute, the District of Columbia had wholly failed to extend Lamont Street through said squares; that the District of Columbia had wholly abandoned, renunciated and repudiated the purpose of said condemnation; that demand had been made upon said District for a refund of the $200.00 so paid, but the same had not been refunded.

To said declaration the District of Columbia filed, first, a plea to the jurisdiction, and, second, an affidavit of defense. The plea stated, in substance, that the supposed cause of action did not arise out of any contract, express or implied, whereby any debt was due plaintiff (defendant here), nor did the amount claimed by plaintiff arise out of damages due from the same, or from any wrong or injury to the plaintiff or her property. The affidavit of defense filed by said District admitted the condemnation proceedings and

the assessment for $200.00 growing therefrom, but set forth that although it protested the necessity so to do, the District denied it had abandoned the purpose of said condemnation. Said affidavit of defense further stated that more than three years had elapsed since the time when the right to maintain said action, if any, accrued.

Trial was had, without jury, upon the above pleadings, at which certain evidence was introduced by defendant Thompson, to the effect that since the ratification of the verdict in the condemnation case and to the time of filing said suit, the land condemned had not been laid out into roadway, sidewalk or parking space, nor had it been graded, paved or otherwise physically improved for highway purposes, nor had any special appropriation been made by Congress for such physical improvement. That in the year 1924 the District of Columbia laid and completed a cement sidewalk and curb across the east end of the condemned tract, the said sidewalk and curb constituting an effective obstruction to any vehicular traffic over the condemned land. *That no official action had been taken by the Commissioners of the District of Columbia or by Congress looking to the abandonment of the title to said land or to the abandonment of the right to physically improve said street.* Defendant Thompson introduced in evidence, over objection and exception of the District of Columbia, the following letter:

"January 29, 1926.

"Mr. Paul V. Rogers,
Counsellor at Law, Evans Building,
Washington, D. C.

Dear Sir:

Receipt is acknowledged of your letter of January 7, 1926, in which you state that you represent several taxpayers, and particularly Georgiana K. Thompson, with reference to certain assessments made under proceedings for the extension of Lamont Street, N. W., as authorized by the Act of Congress approved March 1, 1912. You further state that it appears that the District has now abandoned the project for the exten-

sion of this street, and you have advised your clients that under the circumstances the retention by the District of the benefits so assessed and paid was improper and claim should be made for the refund thereof.

The official files of the Engineer Department indicate that it was never the intention to open Lamont Street between Squares 2604 and 2605 to vehicular traffic, because of the excessive grade. Moreover, it appears that the principal reason for condemnation of the land was to preserve the vista to the Zoological Park and to provide access to the park. The record also shows that it was the intention to treat this street with terraces and steps.

The assessments for benefits in this case were made under a formal condemnation proceeding, and the verdict of the jury was duly ratified and confirmed by the Court. Therefore, the assessments from our consideration of the matter, were legally made, and are legally payable. The only condition under which a refund of the payment made to the District of Columbia can be made is where the facts show the payment to have been made in error. This condition is not present in the matter of the benefit assessments paid under the Lamont Street proceedings.

You are advised that an application for such refunds will not be entertained by this office.

Very truly yours,

(Signed) D. J. DONOVAN,
D. J. DONOVAN,
Auditor of the District of Columbia."

Whereupon judgment was entered for defendant Thompson, plaintiff below, for the amount claimed.

After the entry of said judgment the District of Columbia petitioned the Court of Appeals of said District for a writ of error to the Municipal Court to review said decision. The Court of Appeals granted the petition, the cause was

argued, and on January 7, 1929 said Court of Appeals rendered its decision affirming the judgment of the Municipal Court. In accordance with the rules of the Court of Appeals a petition for rehearing was filed, which alleged, among other things, that said Court had based its decision upon an erroneous assumption of fact, in that said District had not abandoned, and did not intend to abandon, the physical improvement of said street, and upon the erroneous conclusion of law that the Commissioners had the power to abandon such project when they had been not only authorized but *directed* by Congress to carry it out; moreover, that the letter of the Auditor of the District, was not, as a matter of fact, the act of the Commissioners, and could not be, as a matter of law, binding upon them. The petition for a rehearing was denied.

Your petitioner urges that strong reasons exist for the granting of its petition in that said Court of Appeals has held, in effect, that a subordinate official of the Municipality may bind the District of Columbia; that the Commissioners of the District of Columbia have the power to abandon a condemnation proceeding authorized and *directed* by a special Act of Congress; that a contractual relation and obligation exists upon the District of Columbia as the outgrowth of the assessments for benefits in condemnation proceedings. For a further reason for the granting of said petition, your petitioner states that although the cause before this Court involves only the sum of $200.00, there have been filed in the Municipal Court and the Supreme Court of the District of Columbia suits to recover practically the entire amount assessed as benefits in the Lamont Street condemnation case, aggregating approximately $14,000.00.

Your petitioner, therefore, prays that the writ of certiorari may issue out of this Honorable Court, directed to the said Court of Appeals, demanding said Court to certify and send to this Court, at a time certain to be herein designated, a full and complete transcript of all the proceedings in said Court of Appeals in said case, entitled therein,

"District of Columbia, Appellant, vs. Georgiana Thompson, Appellee," No. 4699, to the end that said case may be reviewed and determined by this Court.

Proctor L. Dougherty

William W. Trew

Sidney F. Taliaferro

Alex. L. Bell, Jr.

Attorneys for Petitioner.

W. B. Ladue

Commissioners of the District of Columbia.

DISTRICT OF COLUMBIA, ss:

Proctor L. Dougherty, Sidney F. Taliaferro and William B. Ladue, being first duly sworn, depose and say that they have read the foregoing petition by them subscribed and know the contents thereof; that the matters and things therein stated upon personal knowledge are true and those stated upon information and belief, they believe to be true.

Proctor L. Dougherty

Sidney F. Taliaferro

W. B. Ladue

Commissioners of the District of Columbia.

Subscribed and sworn to before me this 14th day of February, 1929.

Adam A. Giel

Notary Public, D. C.

[SEAL]

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I. THE COMMISSIONERS OF THE DISTRICT OF COLUMBIA HAVE NO AUTHORITY TO ABANDON A PROJECT WHICH CONGRESS HAS AUTHORIZED AND DIRECTED TO BE CARRIED OUT.

The Act of Congress approved March 1, 1912 provided:

"An Act to Authorize the Extension of Lamont Street Northwest, in the District of Columbia.

"Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That under and in accordance with the provisions of subchapter one of chapter fifteen of the Code of Law for the District of Columbia, within six months after the passage of this Act, the Commissioners of the District of Columbia be and they are hereby authorized and directed to institute in the Supreme Court of the District of Columbia a proceeding in rem to condemn the land that may be necessary to extend Lamont Street northwest through squares numbered twenty-six hundred and four and twenty-six hundred and five, with a width of ninety feet, *said extension to be a direct prolongation of Lamont Street as now existing east of Nineteenth Street.* Provided, however, That the entire amount found to be due and awarded by the jury in said proceeding as damages for and in respect of the land to be condemned for said extension, plus the costs and expenses of said proceeding, shall be assessed by the jury as benefits.

Sec. 2. That there is hereby appropriated, out of the revennes of the District of Columbia, an amount sufficient to pay the necessary costs and expenses of the said condemnation proceeding taken pursuant hereto, and for the payments of the amounts awarded as damages, to be repaid to the District of Columbia from the assessments for benefits and covered into the Treasury to the credit of the revenues of the District of Columbia.

Approved, March 1, 1912." (Italics ours.)

It has been held repeatedly by this Honorable Court and by the Court of Appeals of the District of Columbia that the Commissioners of said District are merely ministerial officers deriving their powers solely through the special grant of power by Congress. We submit, therefore, that the Honorable Court of Appeals in the present case has been inconsistent, not only with its own prior decisions, but has failed, as well, to follow the opinions of the Supreme Court of the United States.

A legal controversy closely approaching in similarity the situation presented by the case now before the Court is exemplified by the case of Walter *vs.* MacFarland, 27 Appeals D. C., 182. In that case the question before the Court was whether the Commissioners of the District of Columbia had the power to make changes in the established public streets of the City of Washington. The language of the opinion is so pertinent to the present case that the indulgence of the Court is asked to quote at some length from the decision. The Court said:

> "Municipal governments exist and exercise authority through legislative sanction. For convenience of administration they are created as agents of government for certain local purposes, and have such powers only as are expressly conferred or may be fairly and reasonably implied as necessary to carry into effect such as have been expressly granted. aBrnett *vs.* Denison, 145 U. S. 135, 139, 36 L. ed. 652, 653, 12 Sup. Ct. Rep. 819. And while the laying out, opening, and improvement of streets in towns and cities are matters of peculiar fitness for municipal regulation and control, powers relating thereto must be similarly construed. • • •
>
> "The municipal organization of the District of Columbia is of a peculiar character. There is no general organic law covering all of the ordinary powers usually conferred in the creation of municipal corporations throughout the several States of the Union,—no formal municipal charter, so to speak.
>
> "The commissioners, though vested from time to time with the power to make important regulations,

are ministerial officers. There is no special municipal council or legislative body, as was the case under the preceding form of municipal government. Congress possesses and has retained the powers of a local legislature. Sometimes it enacts special laws relating to local affairs, and sometimes it delegates to the commissioners extensive powers to make rules and regulations respecting specified subjects. The commissioners have no authority to raise revenues for the support of the local government, and those raised by the direct authority of Congress are not turned over to them for appropriation and expenditure at discretion.

"The title in fee to all streets and public reservations in the city of Washington is vested in the United States, and the public parks have been specially intrusted to the care and supervision of one of the departments of the general government. Congress has specially provided, from time to time, for the improvement and extension of the old, established streets, as well as for the opening of new streets, and the changing and closing of others. While such works are provided to be done under the general supervision of the commissioners, their discretion in all matters, including expenditures, is limited by the authorizing acts, and the special appropriations for the purpose. The commissioners cannot close streets; they cannot authorize private encroachments, occupations, or obstructions; they are not permitted to authorize the construction of a street-car line in them."

It will be noted that this case specifically decided "the commissioners cannot close streets." The question involved in the instant case is whether or not the Commissioners could abandon Lamont Street in view of the express provision of Congress that land be condemned for the purpose of extending Lamont Street, "said extension to be a direct prolongation of Lamont Street as now existing east of Nineteenth Street."

From this decision, petition was made to this Honorable Court for the writ of certiorari. The petition was denied.

Again, in the case of Myers *vs.* D. C., 25 Appeals D. C.,

132, the same doctrine is enunciated. Moreover, in the Myers case the Court of Appeals quoted from the opinion of the Supreme Court of the United States handed down in D. C. *vs.* Bailey, 171 U. S. 161, basing the opinion entirely upon what this Court held in the Bailey case. The significant expression which the Court of Appeals selected from the Bailey case for quotation was in the following words:

> "These officers are without general power to contract debts or to adjust and pay the same; that, on the contrary, the statutes expressly deprive them of such power, and limit the scope of their authority to the mere execution of contracts previously sanctioned by Congress, or which they are authorized to make by express statutory authority. The necessary operation of these provisions of the statutes is to cause the District commissioners to be merely administrative officers, with ministerial powers only. The sum of the municipal powers of the District of Columbia is neither vested in nor exercised by the District commissioners. They are, on the contrary, vested in the Congress of the United States, acting *pro hac vice* as the legislative body of the District, and the commissioners of the District discharge the functions of administrative officials."

Congress having once directed the Commissioners to extend Lamont Street, it is absolutely beyond *their* power to alter such direction or disregard that command.

Therefore, we respectfully urge that in the case now under consideration, the Court of Appeals has failed to apply the proper ruling to the facts before it.

II. A SUBORDINATE OFFICER OF THE MUNICIPALITY CANNOT BIND THE DISTRICT OF COLUMBIA.

We feel, that having demonstrated the inability of the District Commissioners to transcend their authorized powers by repudiating the plain direction of Congress; *a fortiori*, one of the subordinate officials of the Municipality

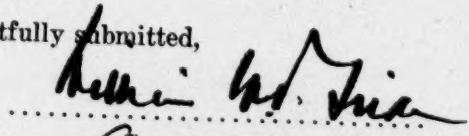
cannot do so. However, as the Court of Appeals seems to assume that the opening of Lamont Street had been abandoned, because a letter was written by the District Auditor to defendant herein to that effect, the following authorities are respectfully called to the attention of the Court.

In the case of Brown vs. D. C., 127 U. S., 579, the plaintiff sued to recover damages for breach of contract. It appeared that the secretary of the board of public works had, by letter, accepted an offer advanced by plaintiff. The Court held that no contract had been made and that it would require the concerted action of a majority of the members of said board to make a valid contract.

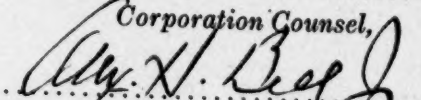
In the case of Stone vs. Bank, 174 U. S., 412, this Court held that a city attorney whose duties were to give legal advice to the city officers and boards and to prosecute and defend suits for the city, had no power to bind the city by an agreement with certain banks that the latter should abide by the results of certain test cases.

It would appear unnecessary to cite further cases upon the question of the power of the District Commissioners, or the scope of the duties of subordinate officers, in view of the express declarations thereon by this Honorable Court as disclosed herein.

Respectfully submitted,



Corporation Counsel,



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